

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF NEBRASKA

|                           |   |                         |
|---------------------------|---|-------------------------|
| UNITED STATES OF AMERICA, | ) | Case No. 4:21 CR 3020   |
|                           | ) |                         |
| Plaintiff,                | ) |                         |
|                           | ) |                         |
| vs.                       | ) | DEFENDANT'S TRIAL BRIEF |
|                           | ) |                         |
| JOHN W. BURTON,           | ) |                         |
|                           | ) |                         |
| Defendant.                | ) |                         |

**COMES NOW** Defendant, JOHN W. BURTON, by and through counsel, Mona L. Burton and hereby submits this Trial Brief.

**FACTS**

Mr. Burton is charged with two (2) counts: Count 1, Possession of Child Pornography, and Count II Intent to Access Child Pornography pursuant to 18 U.S.C. § 2252 (a)(4)(B). (Filing 1). Mr. Burton was on parole at the time the government executed a search warrant on November 17, 2020. At this time, he was living with his 88-year-old father, William Burton. Mr. Burton's father passed away sometime after the search. Law enforcement seized a number of devices containing images of child pornography. The files were created on various dates starting in 2001 and ending in 2018.

Plaintiff provided notice of its intent to offer FRE 404 and 414 evidence. Mr. Burton had been convicted of Statutory Sodomy-1<sup>st</sup> Degree-Deviant Sexual Intercourse with a Person less Than 14. (Government's Exhibit A, p. 2; Filing 53-1) Mr. Burton's sentence began on February 15, 2007, and he was released on parole to his father's home on February 14, 2018. (Government's Exhibit B, p. 3-4; Filing 53-2) Mr. Burton returned to custody in Missouri for a parole violation on January 5, 2021. (Government's Exhibit B, p. 2-3; Filing 53-2)

As indicated in the Plaintiff's Brief in support of its use of FRE 404 and 414 evidence, Mr. Burton has retained a computer forensic expert, Shawn Kasal. Shawn Kasal's analysis indicates the metadata will establish some of the files at issue could not have been created by Mr. Burton. It is anticipated the government will concede this.

Plaintiff intends to call Mr. Burton's son, Sean Burton and Linda Burton, Mr. Burton's ex-wife. It is anticipated Linda will testify after Mr. Burton started serving his sentence in Missouri, possibly 2011, she traveled to Nebraska from Missouri and delivered Mr. Burton's computers to his father's residence. It is anticipated Sean Burton will testify sometime before his father was sentenced (2003-2005), he accessed his father's computer and found files containing images of children. It is unclear whether the Plaintiff intends to offer Sean Burton's testimony as additional FRE 404 and 414 and/or to show the images are some of the same images found on one or more of the devices seized in November 2020.

Defense intends to call a number of witnesses who have had direct contact with William Burton. This evidence is intended to show William Burton previously engaged in sexually deviant behaviors. William Burton had access to the seized devices.

### **EVIDENTIARY ISSUES**

Counsel does not anticipate foundational objections to law enforcement generated reports indicating the images found on the seized devices.

Pending before the court is Plaintiff's FRE 404/414 request. In the event Sean Burton's testimony is offered under 404/414, counsel would make the same objection reflected in the Motion in Limine. (Filing 58). Counsel assumes Sean Burton's testimony is not intended to show Mr. Burton's possession of child pornography in the early 2000's as the indictment charges

possession and intent to access on or about November 17, 2020, and April 17, 2019, respectively. The applicable statute of limitations restricts how far back the Plaintiff can reach. If Plaintiff intends to establish Mr. Burton in 2020 possessed the same images viewed by Sean Burton, it is unclear whether the devices Linda Burton transported to Lincoln are the same devices accessed by Sean Burton.

Mr. Burton was questioned by law enforcement during the search of the home. He did not admit to possessing child pornography or accessing the same with intent to view. However, Mr. Burton did discuss his knowledge of TOR which Plaintiff believes was utilized to access child pornography as charged in Count II of the Indictment. Counsel has notified the court regarding the need of a *Jackson v. Denno* hearing.

### **JURY INSTRUCTIONS**

Defendant submits the standard instructions governing the charged offenses will be sufficient. Depending on the court's ruling on Plaintiff's FRE 404 and 414 request, an instruction concerning propensity would be warranted (Model Jury Instructions, 2.08, 2.08A, 2.09).

Dated: February 8, 2023

JOHN W. BURTON,  
Defendant.

By: /s/Mona L. Burton  
Mona L. Burton # 21696  
ANDERSON, CREAGER &  
WITTSTRUCK, P.C. LLO  
1601 Old Cheney Road  
Lincoln, NE 68512  
(402) 477-8800

mburton@acwlaw.com  
Attorney for Defendant